

November 10, 2004

Docket No. FRA-2004-18746
U.S. DOT Dockets, Room PL-401
U.S. Department of Transportation
400 7th Street, SW
Washington, DC 20590

**Comments of Public Citizen Regarding Union Pacific
Petition for Waiver of Compliance**

Public Citizen welcomes the opportunity to comment on Union Pacific's troubling petition for a waiver of compliance. The petition, which asks that trains inspected by the Transportation Ferroviaria Mexicana (TFM) at a facility near the U.S.-Mexico border be allowed to bypass U.S. safety inspections after crossing into the U.S., jeopardizes both public safety and domestic security. Overall, we see the petition as an attempt to infringe upon the government's sovereign duties to inspect all potentially hazardous shipments of goods arriving within U.S. borders. "Out-sourcing" this responsibility to foreign inspectors would undermine the agency's clear responsibility to both Congress and the public to follow U.S. federal law governing the content and clearance requirements for train inspections.

We are stunned that the FRA would give serious consideration to such a petition, given the numerous and serious concerns it raises regarding both safety and security. We are also appalled by recent revelations about the tight ties between the company and regulators, as documented recently in *The New York Times* (Bogdanich, Walt, "The Railroads and the Safety Overseer, Close Ties," *The New York Times*, Nov. 7, 2004). The FRA's consideration of a special waiver for Union Pacific is particularly suspect when the company's safety record is abysmal. According to statements by FRA to *The New York Times*, Union Pacific "has been inspected more times, has received more violations and has paid more in fines than any other railroad." According to the article, Union Pacific admitted that it paid \$4.1 million in fines last year alone.

While most in Congress are concerned with battening down potential security risks and improving homeland security, the FRA here considers a rule to move back the clock and permit goods to be transported by train into the U.S. without an inspection by U.S. inspectors. We take a very dim view of the agency's consideration of this petition, and hope that it will be rejected as unwise from both a security and safety viewpoint.

The agency's docket does not reflect the evidence nor work on this issue that would permit it to undercut domestic regulation by providing certain companies with a "pass" on their inspection compliance obligations. Furthermore, despite nearly ten years of work by the Land Transportation Standards Subcommittee (LTSS), the transnational body established under NAFTA to address issues of harmonization, numerous regulatory incompatibilities and unresolved problems plague cross-border commercial trucking.

Public Citizen is very concerned that cross-border rail transportation faces similar incompatibilities and problems, and find little indication in the ten-year meeting notes of the LTSS subgroup on trains, or in the agency's very limited docket on this question, that we should be reassured on this score. In light of such issues, an agency decision to grant this petition would unnecessarily jeopardize public safety and security, and fly in the face of the agency's obligation to implement federal rules on train safety. Moreover, FRA's consideration of this petition is inappropriate given the serious security risks posed by trains transporting hazardous materials in the wake of 9/11.

We oppose the Union Pacific petition for a waiver from inspections at U.S. facilities for trains inspected at Mexican facilities due to the significant number of serious safety questions which remain unanswered. For example, there is no evidence to suggest that inspections at the Mexican facility meet U.S. standards, as defined by 49 CFR 232.205 (class I brake test—initial terminal inspection), 232.409 (inspection and testing of end-of-train devices), 215.13 (pre-departure inspection), and 229.21 (daily inspections). In addition, inspector training for U.S. and Mexican companies are not similarly rigorous. Indeed, according to members of the House of Representatives Committee on Transportation and Infrastructure, TFM currently use an introductory program in lieu of a complete training regimen.

Even several visits would not provide enough of a substantive record on the adequacy of inspections. The agency must conduct examinations on a regular basis, over a considerable period of time, to ascertain that TFM is capable of maintaining and funding inspections to check that the company has obtained a needed level of safety. Only after the passage of time demonstrates a record of commitment to safety commensurate with that of the U.S. should the FRA even consider this petition with any degree of seriousness. Checking two trains per week is simply not enough.

We also share the concerns of members of the Committee on Transportation and Infrastructure that until an agreement is reached between the U.S. and Mexico, the FRA will lack real power to ensure TFM compliance with U.S. regulations. Without an agreement granting the FRA disciplinary powers in Mexico, the FRA has no enforcement capabilities to take action against TFM. The FRA needs such capabilities both to discipline the company if it is in non-compliance and to deter non-compliance.

Consideration of this petition by the FRA has already indicated to interested industry parties that the agency is willing to open the floodgates for similar requests. As evidenced by Texas Mexican Railway's (Tex Mex) petition for a waiver of compliance, granting Union Pacific's petition may spur many other companies to petition for waivers

of compliance as well. We also note that it is critical that all records be maintained by Union Pacific.

The cost of this petition is far too high, as it would require the agency to constantly and consistently inspect the Mexican facility to ensure that it meets U.S. standards and expose it to massive political disruption should an unsafe train be admitted and cause a hazmat or other spill. This responsibility would grow if the agency is forced to consider similar petitions, and the FRA should therefore examine its increasingly tenuous and culpable role should the decision be made to move forward. The FRA must address these issues prior to moving forward on any special exemption for Union Pacific or any other entity. If Union Pacific wants to reduce congestion at the Laredo terminal, it should assume the financial responsibility of building more tracks, and not pass the financial burden to the FRA while bending U.S. regulations in the process.

The FRA must positively determine if TFM inspection facilities meet U.S. standards before it decides whether or not to grant Union Pacific's petition. The FRA must respond responsibly to this dangerous waiver, placing U.S. security and safety first, rather than misusing the public trust to facilitate favors for old friends.

The New York Times

For Railroads and the Safety Overseer, Close Ties

November 7, 2004

By WALT BOGDANICH

Federal inspectors were clearly troubled by what they had been seeing in recent years at Union Pacific. According to their written accounts, track defects repeatedly went uncorrected; passenger trains were sent down defective tracks at speeds more than four times faster than were deemed safe; and engines and rail cars were dispatched in substandard condition.

Soon, the inspectors from the Federal Railroad Administration began talking tough: bigger fines and more of them. But as they began to crack down on the railroad, they found themselves under fire from an unexpected quarter: their boss, the agency's deputy administrator, Betty Monroe.

Ms. Monroe demanded to know why agency officials had not pursued the less punitive "partnership" approach that she favored, according to a July 2002 memo from her and the agency's chief at the time, Allan Rutter. A year later, in a senior staff meeting, Ms. Monroe rebuked her subordinates as being "overly aggressive" toward Union Pacific, according to one person present.

Ms. Monroe, who now runs the railroad agency, was in a position to know just how unhappy her inspectors were making officials at Union Pacific. She and the railroad's chief Washington lobbyist, Mary E. McAuliffe, are longtime friends and have vacationed together on Nantucket several times

since Ms. Monroe joined the agency in 2001.

The railroad industry and its federal overseer have long been closely intertwined. And increasingly, like many other federal regulators, the Federal Railroad Administration has emphasized partnership as the best, quickest way to identify, and fix, safety problems from the roots up. But the story of its recent oversight of Union Pacific - spelled out in a series of internal memorandums from agency officials and inspectors - raises questions about whether this closeness has actually served to dull the agency's enforcement edge.

Critics of the agency say that it has, over the years, bred an attitude of tolerance toward safety problems, and that fines are too rare, too small and too slowly collected. Those concerns have been underscored recently by a number of major Union Pacific derailments in Texas and California, including one in which the release of poisonous chlorine gas killed a woman and her daughter in their home near San Antonio.

The ties between industry and regulator are many-layered. Another big railroad company, CSX, offered the agency's chief safety official a job potentially worth \$324,000 a year, with bonuses and stock options, while he was visiting railroad headquarters to discuss safety problems. After the official, James T. Schultz, accepted the job several days

later, a federal watchdog asked that agency officials be instructed on the ethics of discussing job offers.

The agency promotes the rail industry on its Web site, calling it "safe, fuel efficient, environmentally friendly." It has lent millions of dollars to struggling railroads and has helped finance the industry's nonprofit educational campaign, which emphasizes the responsibility of motorists - and not the railroads - in avoiding grade-crossing accidents.

The industry is a rich source of campaign contributions, mostly to the Republicans, with Union Pacific as the biggest giver. Its corporate political action committee was among the top 10 donors to Republican candidates for this election cycle, and Ms. McAuliffe is the treasurer of the company's PAC. The railroad's chairman, Dick Davidson, is identified by the Bush campaign as a "Ranger," having raised more than \$200,000 for the president. Until he became Mr. Bush's running mate in 2000, Dick Cheney was a member of the Union Pacific board.

George Gavalla, who was the F.R.A.'s associate administrator for safety at the time of the efforts to crack down on Union Pacific, said in an interview in August that at times he felt pressured by his superiors to go easier on the railroad - something Mr. Gavalla said he refused to do.

"Every time we do some significant enforcement, particularly on Union Pacific, I would be called in and asked why," said Mr. Gavalla, who has since left the agency.

The F.R.A., asked about why Mr. Gavalla left, would only say that he resigned this fall.

The agency also vigorously denies that it tried to get Mr. Gavalla, or anyone else, to let up on Union Pacific.

In separate statements, the agency and Union Pacific say the railroad has worked diligently to improve its safety record. And any accusation of favorable treatment, the F.R.A. said, is disproved by the fact that over the last four years Union Pacific "has been inspected more times, has received more violations and has paid more in fines than any other railroad." Union Pacific says it paid \$4.1 million in fines last year.

The F.R.A. declined through a spokesman to make Ms. Monro available for an interview, but her former boss, Mr. Rutter, defended her vacations with Ms. McAuliffe, saying they were not only proper but beneficial to regulators.

"Frankly, the business intelligence that we could gather helped us in understanding how our enforcement method was being perceived," said Mr. Rutter, now deputy executive director of the North Texas Tollway Authority.

But Charles Lewis, who runs the Center for Public Integrity, a nonprofit watchdog group in Washington, said the vacations merely underscored "the level of incestuousness between the railroad industry and the regulator."

And the recent derailments have caused some government officials to question the F.R.A.'s oversight of Union Pacific. After five derailments in five months near San Antonio, Senator Kay Bailey

Hutchison, Republican of Texas, asked for a federal investigation into the company's operations in the area. Two of those derailments occurred near a high school; in another case, two engines plunged into a creek, spilling diesel fuel. "People are asking now, 'What's going on?' " said Mayor Edward D. Garza of San Antonio.

In California last month, a Union Pacific train derailed east of Los Angeles, damaging two houses, spilling fuel, cutting off electricity to 100 houses, and forcing the evacuation of 24 homes. A little more than a year earlier, in the same county, a runaway train raced through residential neighborhoods at speeds up to 95 miles per hour before derailling, injuring 13 people and damaging or destroying 8 houses.

Kathryn Blackwell, a spokeswoman for Union Pacific, said the most recent derailments were still under investigation but added that derailments had been declining since 2001. "We have a lot more at stake in preventing derailments and accidents than does the F.R.A.," Ms. Blackwell said.

The Federal Railroad Administration began to emphasize its partnership approach in 1995. "We start with the assumption that railroads and their employees want to promote safety for their own benefit, not just because a law or regulation requires it," the F.R.A. would later explain.

Supporters of this approach, called the Safety Assurance and Compliance Program, say it has sharply reduced accidents by focusing on big-picture problems, rather than minor rule infractions. But, according to longtime

critics of the F.R.A., the industry and its overseers have sometimes taken the concept of cooperation too far.

In October 1997, the F.R.A.'s associate administrator for safety, James T. Schultz, visited CSX's corporate headquarters in Jacksonville, Fla., to discuss serious safety problems at the railroad. During his visit, CSX officials on three successive days discussed employment possibilities with Mr. Schultz, according to an inspector general report.

Several days later, Mr. Schultz accepted CSX's offer to be the railroad's vice president and chief safety officer. The federal watchdog found "no evidence that Schultz violated any criminal conflict of interest statute."

A CSX spokesman said Mr. Schultz, who has since left the company, helped to make the railroad safer.

Some rail-safety advocates say the agency suffers from a reluctance to impose punishment, which has made it less willing to investigate problems. The agency acknowledges that it levies fines for roughly 2 percent of all violations that it finds. The New York Times recently reported that the F.R.A. last year investigated fully just 4 of about 3,000 grade crossing accidents and that the agency had failed to enforce its own rules requiring that railroads promptly report grade crossing fatalities.

"There are a lot of really good people in the F.R.A. who are concerned about safety, but they unfortunately are not making the command decisions," said Paul F. Byrnes, who worked as a lawyer with the agency from 1998 to 2001 and

now consults for a law firm that sues railroads. The agency's leadership, Mr. Byrnes said, had for a time referred to the railroads "as our customers."

In April 2002, after reviewing the F.R.A.'s effort to improve the safety of one railroad company's tracks, the inspector general reminded the agency that on occasion it "will need to act more as a regulator and less as a partner."

Mr. Gavalla, who replaced Mr. Schultz as the agency's safety chief, said he supported the partnership approach. But when it failed to work at Union Pacific, Mr. Gavalla said, he and his staff began a multi-region crackdown on the railroad, with more inspections and more fines. Mr. Rutter and Ms. Monroe, he said, were not pleased.

In a July 2002 memo, for example, they asked Mr. Gavalla to justify the crackdown. While they said they accepted Mr. Gavalla's decision, Mr. Rutter and Ms. Monroe wrote that it "raises questions about whether our newer enforcement philosophy could have been applied in this particular situation."

In the minds of some F.R.A. inspectors, a tougher approach was necessary. A series of internal agency memorandums obtained by The Times showed that agency inspectors were worried that Union Pacific management had not been doing enough to keep their trains and tracks safe.

In one F.R.A. memo, dated May 1, 2002, an inspector said he found 400 track problems near O'Hare International Airport in Chicago. He warned that an accident could cause the release of

hazardous materials, and added, "Consider the mass evacuation, chaos, injury and maybe death that could result from such a catastrophe."

The inspector wrote that he believed Union Pacific was "either ignoring the conditions at this facility" or "not conducting thorough inspections."

In another memo, from November 2002, F.R.A. inspectors said that because Union Pacific had done a poor job of fixing track defects near Shreveport, La., trains should not have been allowed to go faster than 10 to 15 miles per hour. Even so, the inspector said, the railroad raised the speed of the track back up to 75 m.p.h. for passenger trains and 70 m.p.h. for freight trains.

But the findings that most troubled the inspectors occurred in Union Pacific's North Little Rock service area in Arkansas. In a July 2003 memo, F.R.A. officials said Union Pacific's own inspectors had told them that railroad managers "had interfered with their ability to perform inspections." According to that memo, the agency had found conditions "so egregious that it was apparent that the railroad inspectors were not identifying defects in the track, and were doing so with their managers' tacit approval."

The officials further charged that some violations had been "willful," according to the July memo.

That same month, Mr. Gavalla said he and his senior staff visited Union Pacific headquarters in Omaha to discuss safety issues. But just before the meeting, Mr. Gavalla said, Betty Monroe told the F.R.A. staff that over dinner

the previous night, Union Pacific officials had angrily complained that the agency had been picking on them. Mr. Gavalla said he recalled Ms. Monro saying that that conduct was not going to be tolerated.

Jenny Nordberg contributed reporting for this article.

Later, Mr. Gavalla said Ms. Monro gave him an e-mail message from Ms. McAuliffe. "The nature and degree of these fines call into question the credibility of F.R.A. senior management who have expressed a desire to work with the railroads and Union Pacific in a performance-based partnership," Ms. McAuliffe wrote.

Though the F.R.A. would not comment on the friendship between Ms. Monro and Ms. McAuliffe, the Union Pacific spokeswoman, Ms. Blackwell, said the two women had been friends for more than 25 years, "long before either of them was involved with railroads."

Ms. Blackwell said each woman paid her own expenses during the five vacations they took together - sometimes with other people - after Ms. Monro joined the F.R.A. in 2001.

"Ms. McAuliffe and Ms. Monro were aware that this friendship would put them under scrutiny by some people who may question the appropriateness of the relationship. That is why they chose to continue the friendship in an open and honest way."

The F.R.A. and Union Pacific said the friendship did not affect how the agency dealt with the railroad. Said Ms. Blackwell, "To suggest that U.P. received preferential treatment due to this friendship - or due to political contributions - would be dead wrong."